No. 49513-9-II (Consolidated)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Welfare of

I.F., A Minor Child,

M.F., Appellant.

Clark County Cause No. 16-7-00592-8

The Honorable Commissioner Carin Scheinberg

Appellant's Motion for Accelerated Review and Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
Email: backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES AND ASSIGNMENTS OF ERROR

1. The evidence was insufficient to find I.F. dependent as to M.F.

2. The state failed to prove that M.F. is I.F.'s biological or adoptive parent.

   ISSUE 1: Under RCW 13.04.011(5), the word "parent" as used in Chapter 13.34 RCW refers only to biological and adoptive parents. Did the state fail to prove that M.F. is the biological or adoptive father of I.F., where undisputed evidence shows that he is neither?

3. The dependency order was entered in violation of M.F.'s Fourteenth Amendment right to due process.

4. The trial court erred by refusing to order a DNA test so M.F. could establish that he is not I.F.'s father.

5. The trial court erred by entering a dependency order, given that M.F. is not I.F.'s biological or adoptive father, has never claimed to be her biological father, has no meaningful relationship with her, and is not seeking to parent her.

6. Chapter 13.34 RCW violates due process as applied to M.F. because it provides no mechanism for a presumed father to show that he is not a child's parent within the context of a dependency proceeding.

   ISSUE 2: The government may not deprive a person of liberty without due process of law. Does Chapter 13.34 RCW violate due process as applied because it allows entry of a dependency order without providing a mechanism for a presumed father to show that he is not the dependent child's parent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Although not divorced, M.F. had separated from D.C. more than a year before she gave birth to her daughter I.F. in 2008. RP (8/16/16) 3, 7; RP (9/22/16) 15; CP 151. M.F. is not the biological father of I.F. CP 98.

Because they had two children together, M.F. maintained a relationship with D.C. after the separation. CP 97, 151. When her new partner abandoned her, M.F. went to the hospital to support the mother D.C. at I.F.'s birth. CP 97. His name does not appear on the birth certificate, but he allowed I.F. to take his last name, so that her surname would match that of her two siblings. CP 97, 99; RP (8/16/16) 7.

M.F. has never claimed to be I.F.'s biological father. D.C. agrees that he is not I.F.'s biological father. CP 98.

I.F. herself knows that M.F. is not her father and does not look to him as a primary parental figure. CP 1, 98; RP (8/16/16) 9. The two do not have a meaningful relationship. RP (9/22/16) 17, 23, 25, 34-36.

The couple divorced in 2011, approximately four years after they separated. CP 117-119, 151. D.C. drafted the paperwork, and included I.F. on the parenting plan even though she is not M.F.'s child. CP 101, 151. The parenting plan prohibited M.F. from contact with his own children as well as I.F., and listed D.C. as the sole decision-maker. CP 101-106, 109.

M.F. signed the paperwork despite being unable to understand what it said (due to his difficulty reading and understanding English).[1] CP 151; RP (9/22/16) 24.

CPS became involved after the mother's partner/husband sexually abused one of the children and the mother helped him avoid arrest. CP 3-4. After these allegations surfaced, M.F. went to court and obtained a restraining order placing his two children with him. CP 3, 152.

Shortly before D.C. was to be arrested for rendering criminal assistance, M.F.'s fiancée helped M.F. file amended paperwork to add I.F. in the request for a restraining order and for modification of the parenting plan. Ex. 1-4.[2] This was apparently done at the urging of a volunteer attorney or courtroom facilitator. RP (9/22/16) 18-20, 23-24, 48-51.

M.F.'s fiancée drafted the paperwork for him to sign. RP (9/22/16) 48-49. His fiancée later testified that she didn't translate the documents for him because of the rush (to get the matter heard before D.C.'s arrest). RP (9/22/16) 48-51.

In his declarations, M.F. explained that he wished to add I.F. to the modification and restraining order proceedings because he was afraid that

---

[1] M.F.'s first language is Spanish. He requires an interpreter for court proceedings.

[2] He filed a Declaration, an Amended Petition to Change a Parenting Plan, an Amended Motion/Declaration for Ex Parte Restraining Order and for Order to Show Cause, and an Amended Motion and Declaration for Temporary Order. *See* Ex. 1-4.

she would end up in foster care, which could prove traumatic. Ex. 1, 3.[3] He did not claim to be I.F.'s biological father. Instead, he explained that I.F. had been born after the couple's separation, but that "Due to [I.F.] being 7 years old, past the age of four I am legally her father." Ex. 1. This was apparently a reference to the time limit imposed under RCW 26.26.530(1).[4]

D.C. was arrested, I.F. was taken into protective custody, and the department filed a dependency petition. CP 3-4.

Ultimately, M.F. was awarded custody of his two children. CP 152. He and his fiancée had abandoned their attempt to help I.F. after realizing they could not care for her in addition to the five other children in their household.[5] RP (9/22/16)20-21; CP 152

Because he had been married to D.C. at the time of I.F.'s birth, M.F. was presumed to be I.F.'s father for purpose of the dependency proceedings. CP 1. The two had been separated for more than a year at the time of I.F.'s birth, and there is no evidence that he cohabited with her or engaged in sexual intercourse with her during the preceding year. CP 151.

---

[3] M.F. and his fiancée also believed M.F. could be prosecuted for abandonment if he didn't seek custody of I.F. RP (9/22/16) 51. The source of this misinformation does not appear in the record.

[4] The time limit does not actually apply to M.F., because he may seek to disprove paternity at any time pursuant to RCW 26.26.530(2), since he has never held out I.F. as his own and meets the other requirements of the statute.

[5] M.F.'s fiancée has three children of her own. RP (9/22/16) 16.

Although he continued to spend time with his own children (in the company of D.C. and I.F.), he did not hold himself out as I.F.'s father, and she knew that he was not her father. CP 98; RP (8/16/16) 9; RP (9/22/16) 34-36, 43.

Through counsel, M.F. asked the court to authorize DNA testing so that he could prove he was not I.F.'s father.[6] CP 92.

The court denied his request for DNA testing,[7] ruling that M.F. needed to pursue the matter in family court rather than in the context of the dependency proceeding.[8] CP 153, 156. The dependency case went to trial. CP 284; RP (9/22/16) 4-63.

At trial, M.F. again argued that he was not I.F.'s father and should not be a party to the dependency proceeding. CP 164-173. His attorney also argued that M.F. should not bear the burden of disestablishing paternity for purposes of the dependency proceeding. RP (9/22/16) 52-54.

Following trial, the court found that I.F. had no parent capable of adequately caring for her under RCW 13.34.030(6)(c). The court entered an "Order of Dependency as to [M.F.]," and M.F. appealed. CP 302, 312.[9]

---

[6] He also asked for a continuance of the dependency trial. CP 146.

[7] M.F. filed a Notice of Discretionary Review. That case was consolidated with this appeal.

[8] The court also denied his request for a continuance. CP 280.

[9] The appeal was consolidated with the discretionary review matter.

ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT I.F. IS DEPENDENT AS TO M.F., BECAUSE HE IS NEITHER HER BIOLOGICAL NOR HER ADOPTIVE PARENT.

A special definition of parent applies to proceedings under Chapter 1334 RCW. That definition is found in RCW 13.04.011(5), which reads:

> "Parent" or "parents," *except as used in chapter 13.34 RCW,* means that parent or parents who have the right of legal custody of the child. "Parent" or "parents" *as used in chapter 13.34 RCW,* means the biological or adoptive parents of a child unless the legal rights of that person have been terminated by judicial proceedings

RCW 13.04.011(5) (emphasis added).

Here, the trial court found I.F. dependent as to M.F., whom it deemed her father. CP 302. But M.F. does not qualify as I.F.'s parent under RCW 13.04.011(5), because he is neither a biological nor an adoptive parent.

It is undisputed in this case that he is not I.F.'s biological father. CP 98; RP (8/16/16) 3-15; RP (9/22/16) 4-63. Furthermore, nothing suggests that he ever adopted I.F.

Under these circumstances, the evidence was insufficient to show that I.F. is dependent as to M.F. The dependency order must be reversed and the Petition dismissed with prejudice.

II. CHAPTER 13.34 RCW VIOLATES DUE PROCESS AS APPLIED TO M.F. BECAUSE IT PROVIDES NO MECHANISM FOR LITIGATING A CHILD'S PARENTAGE WITHIN THE CONTEXT OF A DEPENDENCY PROCEEDING.

M.F. is not I.F.'s biological father. No one has ever claimed that he is the biological father, and he has not held himself out as such. I.F. knows he is not her father, and the two have no meaningful relationship. He is not seeking to parent I.F.

Despite this, there is no avenue available for M.F. to contest paternity in the context of dependency proceedings initiated by the state. This violates M.F.'s right to due process.

A. Due process prohibits entry of a dependency order against a person who is not a biological or adoptive parent of the child, who has never claimed to be the biological parent, who is not alleged to be the biological parent, who has no meaningful relationship with the child, and who is not seeking to parent the child.

The Fourteenth Amendment prohibits the state from depriving a person of liberty without due process of law. U.S. Const. Amend. XIV. Courts resolve procedural due process claims by balancing the individual interest at stake, the risk of error posed by the available procedures, and the state's interest in a particular procedure. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Here, the balance of interests prohibits entry of a dependency order against M.F. based on a statutory presumption of paternity that is demonstrably false.

First, M.F. has a strong interest in avoiding a finding that he's incapable of parenting.[10] I.F. is not his biological child, and no one (including the mother) has ever claimed otherwise. I.F. knows M.F. is not her father, and the two have no meaningful relationship. M.F. is not seeking to act as I.F.'s parent.[11]

In addition to his interest in avoiding a dependency finding, M.F. also has an interest in avoiding ongoing court proceedings that could result in orders directing him to act or to refrain from certain behavior. He also has an interest in avoiding any termination proceeding that might follow the dependency finding.

The first *Mathews* factor weighs against the current procedure.

Second, the risk of error posed by the existing procedure is great. The statutory scheme provides no mechanism to challenge a paternity presumption except by litigating the issue under Chapter 26.26 RCW.

M.F. is indigent and is not fluent in English. CP 151, 188, 329; RP (9/22/16) 19, 24. He does not have the wherewithal to bring a separate action challenging paternity on his own.[12] Requiring presumed fathers in

---

[10] The court did not find that he'd abandoned, abused, or neglected I.F. CP 304.

[11] Furthermore, he has apparently been deemed capable of parenting his two children, who moved from D.C.'s care to his own without CPS intervention. CP 1-4.

[12] In addition, it is possible that the time for doing so lapsed before the dependency petition was filed. *See* RCW 26.26.530(1). Because M.F. neither cohabited with nor had sexual intercourse with D.C. during the probable time of conception and never held out I.F. as his own, he could likely proceed under RCW 26.26.530(2).

dependency proceedings to separately litigate paternity at their own expense disproportionately burdens those who, like M.F., lack the funds to hire private counsel. It would be simple enough to allow the parties to litigate issues of parentage in the context of the dependency proceeding, with the assistance of counsel who has been appointed to represent the parent in the dependency proceeding.

The second *Mathews* factor weighs against the current procedure.

Third, the state has no interest in establishing a dependency as to a person who is not a biological or adoptive parent, who has never been alleged to be or claimed to be the biological parent, who has no meaningful relationship with the child, and who is not seeking to parent the child. This is especially true where the child knows the person is not her father, and where the mother has identified another person as the child's biological father.

The third *Mathews* factor thus weighs against the current procedure.

M.F. should have been permitted to litigate the issue of paternity—with the assistance of his court-appointed attorney—in the dependency proceeding. All three *Mathews* factors weigh against the current procedure, where a presumed father has no mechanism to disestablish paternity except by bringing a separate action at his own expense.

Chapter 13.34 RCW violates procedural due process as applied to M.F. *Mathews*, 424 U.S. at 335. The dependency order must be vacated and the case remanded for proceedings to adjudicate parentage within the dependency proceeding. M.F. should be afforded counsel, and any DNA testing should be at public expense.

B. The Court of Appeals should review this manifest constitutional error *de novo*.

Constitutional issues are reviewed *de novo*. *State ex rel. Banks v. Drummond*, 92749-9, 2016 WL 7321801, at *4 (Wash. Dec. 15, 2016). The Court of Appeals will review a manifest error affecting a constitutional right even if the error was not pointed out to the trial court. RAP 2.5(a)(3).

To raise a manifest constitutional error, an appellant need only make "a plausible showing that the error... had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014).[13] An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010).

[13] The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.*

Here, M.F. sought DNA testing and resisted the dependency finding because he is not I.F.'s father, but he did not specifically argue a due process violation. Nonetheless, the refusal to order DNA testing and the entry of the dependency order are manifest errors affecting M.F.'s constitutional right to due process, and thus may be reviewed under RAP 2.5(a)(3).

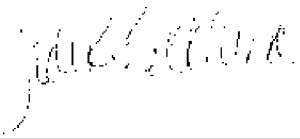
The error here had practical and identifiable consequences. *Lamar*, 180 Wn.2d at 583. The trial court had all the information necessary to correct the error. *Id.*

CONCLUSION

For the foregoing reasons, the dependency order must be vacated and the case remanded with instructions to adjudicate I.F.'s parentage within the dependency proceeding.

Respectfully submitted on January 13, 2017.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Motion for Accelerated Review/Opening Brief, postage prepaid, to:

M.F.
4714 NE 72nd Avenue
Vancouver, WA 98661

I delivered an electronic version of the brief, using the Court's filing portal, to:

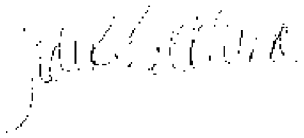
Office of the Attorney General
vanfax@atg.wa.gov
danielh2@atg.wa.gov
kristing@atg.wa.gov

and to Linda Staples (linda@staples.lawoffice.com)

I filed the Appellant's Motion for Accelerated Review/Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 13, 2017.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

January 13, 2017 - 4:41 PM

Transmittal Letter

Document Uploaded: 4-495139-Other Brief.pdf

Case Name: In re the Welfare of I.F.

Court of Appeals Case Number: 49513-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Other__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

Motion for Accelerated Review and Opening Brief

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

vanfax@atg.wa.gov
danielh2@atg.wa.gov
kristing@atg.wa.gov